IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 22.11.2006

CORAM

THE HONOURABLE MR. JUSTICE S.J.MUKHOPADHAYA
AND
THE HONOURABLE MR. JUSTICE F.M.IBRAHIM KALIFULLA

O.S.A. NOS. 147, 148 & 200 OF 2006
AND
C.M.P. NOS. 6341 & 6354 OF 2006 & M.P. NO. 2 OF 2006

O.S.A. NO. 147 OF 2006

1. P.Hema
2. Smt. S.Rajalakshmi
3. K.Sudarsanam .. Appellants

- Vs -

1. M.Muthusamy
   Administrator
   RPS Benefit Fund Ltd.
   (In Liquidation)
   Bar Association, Chennai - 104.

2. P.G.Saranyan
3. S.Premchand
4. C.G.Rangabashyam
5. R.Srihari

6. The Dy. Superintendent of Police
   E.O.W. II, Omanthoorar Estate
   Chennai - 2. .. Respondents

O.S.A. NO. 148 OF 2006

1. P.G.Saranyan
2. S.Premchand .. Appellants

- Vs -

1. M.Muthusamy
   Administrator
   RPS Benefit Fund Ltd.
   (In Liquidation)
   Bar Association, Chennai - 104.
2. P.Hema
3. Smt. S.Rajalakshmi
4. K.Sudarsanam
5. C.G.Rangabashyam
6. R.Srihari

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7. The Dy. Superintendent of Police
E.O.W. II, Omanthoorar Estate
Chennai – 2. .. Respondents

O.S.A. NO. 147 OF 2006

1. R.Srihari .. Appellants

- Vs -

1. M.Muthusamy
Administrator
RPS Benefit Fund Ltd.
(In Liquidation)
Bar Association, Chennai – 104.

2. P.G.Saranyan
3. S.Premchand
4. P.Hema
5. Smt. S.Rajalakshmi
6. K.Sudarsanam
7. C.G.Rangabashyam

8. The Dy. Superintendent of Police
E.O.W. II, Omanthoorar Estate
Chennai – 2. .. Respondents

O.S.A. No.147 of 2006 filed under Order XXXVI Rule 9 of O.S.Rrule, R/w. Clause 15 of the Letters Patent against the order and decreetal order dated 22.3.2006 made in C.A. No.1101 of 2005 in C.P. No.233 to 238 of 1999 as stated therein.

O.S.A. No.148 of 2006 filed under Order XXXVI Rule 9 of O.S.Rule, R/w. Clause 15 of the Letters Patent against the order and decreetal order dated 22.3.2006 made in C.A. No.1101 of 2005 in C.P. No.233 to 238 of 1999 as stated therein.

O.S.A. No.200 of 2006 filed under Order XXXVI Rule 9 of O.S.Rrule, R/w. Clause 15 of the Letters Patent against the order and decreetal order dated 22.3.2006 made in C.A. No.1101 of 2005 in C.P. No.233 to 238 of 1999 as stated therein.

For Appellants : Mr. A.L.Somayaji, SC, for
Mr. K.Muthamilraja in OSA 147/06
Mr. T.V.Ramanujun, SC, for
Mr. T.V.Krishnamachari in OSA 148/06
Mr. M.S.Krishnan for M/s.Sarvabhuman
Associates in OSA 200/06

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For Respondents: Mr. Arvind P.Datar, SC, for
Mr. M.Muthusamy, for R-1 in all OSAs
Mr. P.Gangadhara Rao, O.L.

COMMON JUDGMENT

S.J.MUKHOPADHAYA, J.

1. All these original side appeals arise out of a common order dated 22.3.06 passed by the learned Company Judge in Company Application No.1101/05 in C.P. Nos. 233 to 238 of 1999. By the said order, the learned Company Judge, while passing penal order against the respondents/appellants, also held that the application under Sections 542 and 543 of the Companies Act, 1956 preferred by the "Administrator" is maintainable.

2. The questions required to be determined in these appeals are:-

> "a) Whether the "Administrator" appointed by the court to look into the affairs of the company in liquidation, during the pendency of the proceedings for liquidation, could move an application under Sections 542 and 543 of the Companies Act, 1956 ?
>
> b) Whether the learned Company Judge has jurisdiction under Section 542 of the Companies Act, 1956 to punish the guilty person for the criminal offence mentioned thereunder ?"

3. The company in liquidation, namely, RPS Benefit Fund Ltd., (hereinafter referred to as "the company") is a "Nidhi" started on 9.11.1990 by the first appellant, P.G.Saranyan and members of his family. The company had 16,000 depositors and collected a sum of Rs.43 crores and later on collapsed. Number of company petitions being C.P. Nos.233 to 238 of 1999 were preferred by the creditors with their claim for winding up of the company. It appears, as informed by Mr.Arvind P.Datar, learned senior counsel appearing for the Administrator, that large number of "Nidhis" collected amount from number of depositors and were made to collapse or the amounts were misappropriated. A number of company petitions were filed wherein Administrators were appointed (about 14 in number) to look into the affairs of such companies in liquidation covering four lakh depositors with loss to the tune of Rs.1,100 crores. Under extraordinary circumstances, since 1999, these Administrators including the "Administrator" of the company in question were appointed to look into the affairs. Such appointment was made apart from the appointment of Official Liquidator. There being diversion of funds of the company inspite of definite provision made under Section 620-A and the notification in this regard, the learned Company Judge passed the following order on 4.10.1999 :-

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"It discloses prima facie fraud of massive proportions having been committed by the President of Company one P.G.Saranyan apparently with the company-operation and approval of the other members of the Board of Directors of this company, it's employees and other persons known and unknown including the two companies viz., Lakshmi Trade Credits Limited and Ajit Diary Industries Limited, both of which are said to be controlled by the said P.G.Saranyan and members of his family."

4. The learned Company Judge having noticed the relevant facts and that a sum of Rs.47 crores was collected, held that about Rs.28 crores disappeared from the company within a span of less than twelve months.

5. In view of the aforesaid observation of the learned Company Judge, the Administrator of the company (RPS Benefit Fund Ltd.), filed C.A. No.1101/05 under Sections 539 to 543 of the Companies Act, 1956 and sought for a declaration that respondents 1 to 7 (appellants herein) were jointly and severally liable for the same and sought for a direction to prosecute respondents 1 to 7 (appellants herein) under the Companies Act, 1956. Though in the petition, the provision of Sections 539, 540 and 541 were mentioned, the Judge's summons, as it appears, were issued under Sections 543 to 545 of the Companies Act, 1956 read with Rules 9, 11(b) and 19 of the Companies (Court) Rules, 1959. The respondents (appellants herein) appeared, denied the allegation, contested the application and opposed the prayer and took a specific plea that all steps were taken bona fide in the interest of the company. Clarifications were also given with regard to each allegation as noticed and discussed by the learned Company Judge. However, such clarification and reason shown by the appellants were not accepted by the learned Company Judge, who passed the impugned penal order.

6. The appellants, who were the respondents, raised the question of maintainability of the application under Sections 542 and 543 of the Companies Act, 1956 preferred by the Administrator of the company. Having noticed the provisions that a Receiver could be appointed with the leave of the court, learned Company Judge observed that the Administrator was appointed for that purpose and taking into consideration that an investigating committee was asked to go into the affairs of the company, held that the application under Sections 542 and 543 preferred by the Administrator is maintainable.

7. Mr.Arvind P.Datar, learned senior counsel for the Administrator submitted that though the role of the Administrator in no way compete with the jurisdiction of the Official Liquidator, would submit that his role is more in the nature of complementing

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the work of the official liquidator. The Administrator having empowered to investigate in the affairs and to take charge of the assets and to realise the dues by the sale of the properties, the logical conclusion should be that he was empowered to act on behalf of the official liquidator. According to him, the Administrator has to act in accordance with the directions of the Company Judge and he is empowered to exercise all the powers of the liquidator; the application for sale of the property, application against debtors and for other proceedings are only made by the Administrator. Similarly, even in the matter relating to bills or for sanction of scheme, only the Administrators are allowed to file the applications. As Administrator is functioning on behalf of the official liquidator by the order of the court, it was submitted that the objection raised by the respondents (appellants herein) is liable to be rejected.

8. We are afraid that such submission could be accepted mainly on the ground that one or other action was earlier taken by the Administrator of the company or Administrators of other companies when not opposed by any person. If a person has no jurisdiction to take a particular action or decision, merely because such action or decision was taken in the past by such person, will not clothe him with the power and jurisdiction. Section 542 deals with the liability for fraudulent conduct of business, if found in the course of winding up of a company. If it comes to the notice of the company Judge/Tribunal that any business of the company had been carried on with intent to defraud the creditors of the company or any other person or for any fraudulent purpose, appropriate declaration could be made and the liability of such person could be determined or appropriate order may be passed under Sub-section (2) of Section 542 of the Act. However, such order could be passed only on the application of the official liquidator or liquidator or any creditor or contributory of the company, as evident from Section 542 of the Act, quoted hereunder :-

> "542. Liability for fraudulent conduct of business.--(1) If in the course of the winding up of a company, it appears that any business of the company has been carried on, with intent to defraud creditors of the company or any other persons, or for any fraudulent purpose, the Tribunal, on the application of the Official Liquidator, or the liquidator or any creditor or contributory of the company, may, if it thinks it proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Tribunal may direct.

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On the hearing of an application under this sub-section, the Official Liquidator or the liquidator, as the case may be, may himself give evidence or call witnesses.

(2)(a) Where the Tribunal makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration.

(b) In particular, the Tribunal may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf.

(c) The Tribunal may, from time to time, make such further order as may be necessary for the purpose of enforcing any charge imposed under this sub-section.

(d) For the purpose of this sub-section, the expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Where any business of a company is carried on with such intent or for such purpose as is mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to fifty thousand rupees, or with both.

(4) This section shall apply, notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made."

9. So far as Section 543 of the Act is concerned, it enables the company Judge/Tribunal to assess damages against the delinquent

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directors, manager, liquidator or officer of the company in case such person has misapplied or retained or become liable or accountable or has been guilty of any misfeasance or breach of trust in relation to the company. It is only if an application to that effect is preferred by the official liquidator or liquidator or any creditor or contributory within the time prescribed, the company Judge/Tribunal may compel the person concerned to repay or restore the money or property. While Section 542 makes a person criminally liable for punishment, Section 543 is civil in nature as it only enables the guilty person to repay or restore the money or property with the company as will be clear from the provisions of Section 543 and quoted hereunder :-

> "543. Power of Tribunal to assess damages against delinquent directors, etc.--(1) if in the course of winding up of a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, manager, liquidator or officer of the company--
>
> (a) has misapplied, or retained, or become liable or accountable for, any money or property of the company; or
>
> (b) has been guilty of any misfeasance or breach of trust in relation to the company,
>
> the Tribunal may, on the application of the Official Liquidator, or the liquidator, or of any creditor or contributory, made within the time specified in that behalf in sub-section (2), examine into the conduct of the person, director, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Tribunal thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Tribunal thinks just.
>
> (2) An application under sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust as the case may be, whichever is longer.
>
> (3) This section shall apply notwithstanding that the matter is one for which the person concerned may be criminally liable."

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10. So far as the criminal action as envisaged under Section 542 is concerned, for the purpose of enforcement of the order of the company Judge/Tribunal, the official liquidator or liquidator can ask for permission to prosecute the guilty person by filing an application under Section 457 (1) (a) of the Companies Act. The company Judge/Tribunal, in such cases, after giving a declaration under Section 542, may permit the official liquidator or liquidator to move the court of criminal jurisdiction for appropriate order to ensure punishment as may be imposed under Sub-section (3) of Section 542.

11. From the aforesaid facts it will be evident that the company Judge/Tribunal can give a declaration and pass order either under Section 542 or under Section 543 of the Act or both only if an application is preferred by the official liquidator or liquidator or any creditor or contributory of the company. Though the company Judge/Tribunal may give appropriate declaration and pass order under Sections 542 and 543, but for penal order under Sub-section (3) of Section 542, it could only give permission to the official liquidator or liquidator to prefer an application before the court of competent criminal jurisdiction, but no order of punishment with imprisonment or fine or both could be passed by the company Judge/Tribunal under sub-section (3) of Section 542 of the Companies Act, 1956.

12. Mr. Arvind P.Datar, learned senior counsel relied on principle of casus omissus while placing the Sections 542 and 543 of the Act and requested the court to read the provision accordingly. He would submit that the Administrator having been appointed by the company Judge, it should be held that the Administrator has been appointed to complement the work of the official liquidator and thereby the Administrator could also file a petition under Sections 542 and 543 of the Act. However, such submission cannot be accepted as there is nothing on the record to suggest that the official liquidator empowered the Administrator to perform the job on his behalf and in view of a catena of decisions of the Supreme Court with regard to interpretation of statute.

13. It is the settled law that if a person or body created under the statute and such express powers have been given to such person or body under the provision of law, it would not be legitimate to have resorted to general or implied powers under the law. In this connection, we may refer to the Supreme Court decision rendered in Smt.Hira Devi & Others Vs. District Board, Shahjahanpur reported in AIR 1952 SC 362.

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14. In the case of S.T. Commissioner, U.P. – Vs – M/s. Parson Tools and Plants, Kanpur reported in AIR 1975 SC 1039, the Supreme Court held as follows :-

> "12. If the legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation by analogy or implication, something what it thinks to be a general principle of justice and equity. "To do so" – (at p.65 in Prem Nath L.Ganesh v. Prem Nath L.Ram Nath AIR 1963 Punj. 62. Per Tek Chand J.) "would be entrenching upon the preserves of Legislature", the primary function of a court of law being jus dicere and not jus dare."

15. The principle of construction was discussed and elaborated by the Supreme Court in the case of I.T.Commissioner, Calcutta – Vs – National Taj Traders reported in AIR 1980 SC 485 wherein the Apex Court held as follows :-

> "10. Two principles of construction – one relating to casus omissus and the other in regard to reading the statute as a whole appear to be well settled. In regard to the former the following statement of law appears in Maxwell on Interpretation of Statutes (12th Edn.) at page 33:
>
> > "Omissions not to be inferred--"It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. Lord Morsay said: 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do'. 'We are not entitled', said Lord Loreburn L.C., 'to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. A case not provided for in a statute is not to be dealt with merely because there seems no good reason why it should have been omitted, and the omission appears in consequence to have been unintentional."

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In regard to the latter principle the following statement of law appears in Maxwell at page 47:

> A statute is to be read as a whole--"It was resolved in the case of Lincoln College"s case (1595) 3 Co Rep 58b, at page 59b that the good expositor of an Act of Parliament should 'make construction on all the parts together, and not of one part only by itself'. Every clause of a statute is to be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute.' (Per Lord Davey in Canada Sugar Refining Co.Ltd. v. R., 1898 AC 735 (Canada)."

In other words, under the first principle a casus omissus cannot be supplied by the Court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature. "An intention to produce an unreasonable result" said Danckwerts L.J. In Artemiou v. Procopiou (1966) 1 QB 878), "is not to be imputed to a statute if there is some other construction available". Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. (Per Lord Reid in Luke v. I.R.C., 1963 AC 557 where at p.577 he also observed: "this is not a new problem, though our standard of drafting is such that it rarely emerges". In the light of these principles we will have to construe sub-sec.(2)(b) with reference to the context and other clauses of S.33-B."

Similar view was expressed by the Supreme Court in the case of M/s. Unique Butyle Tube Industries Pvt. Ltd. - Vs - U.P. Financial Corporation & Others reported in AIR 2003 SC 2103.

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16. From a plain reading of Sections 542 and 543 as a whole, as it is evident that the statute itself is very clear and there is no ambiguity with regard to entitlement to filing an application under Sections 542 and 543, the principle of law of casus omissus cannot be supplied by the court in the absence of any necessity.

17. From the above said finding, it will be evidence that the application under Sections 542 and 543 preferred by the Administrator of the company in liquidation was not maintainable nor the learned Company Judge was empowered to impose a fine in lieu of imprisonment under Sub-section (3) of Section 542 of the Companies Act, 1956. In such background, we have no other option but to set aside the impugned order dated 22.3.06 passed by the learned company Judge in C.A. No.1101/05 and the same is accordingly set aside. However, this order shall not stand in the way of the official liquidator or liquidator or any creditor or contributory of the company to prefer application under Sections 542 and 543 or both in view of the observation made by the learned company Judge on 12.1.99, which is not under challenge.

18. The impugned order of the learned company Judge is set aside and the original side appeals are allowed with the above observation. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

22.11.06

These appeals having been posted on Thursday, the Twenty First day of December 2006 "For being Mentioned" and upon perusing the order of this Court dt. 22.11.2006 and made herein and in the presence of the aforesaid advocate, the Court made the following order:-

These appeals are disposed of on 22.11.2006 and it has been brought for 'being mentioned', at the instance of the appellant, who wanted to highlight certain facts on merits.

In this connection, we only observe that this Court set aside the order dated 22nd March 2006 passed by the learned Company Judge, on the ground that the petition preferred by the administrator was not maintainable. No decision was given by this Court on Merits.

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It may be raised by the concerned party at apropriate stage, before appropriate forum. No further order is required to be passed in these appeals.

GLN

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

The Sub Assistant Registrar,
Original Side, High Court, Madras

3 ccs to Mr.M.Muthusamy, Advocate, SR.64343
1 cc to Mr.K.Muthamil Raja, Advocate, SR.64516
1 cc to Mr.T.V.Krishnamachari, Advocate, SR 64515

mdr (co)

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